UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STACEY L. LIPPMAN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-240-P-H***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD")and Supplemental Security Income ("SSI") appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner's determination that improvement in the plaintiff's medical condition terminated her disability as of January 19, 1995. I recommend that the court vacate that portion of the Commissioner's decision and remand for further proceedings.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § § 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir.

[1]This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

1982), the Administrative Law Judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on February 11, 1993, the date she became unable to work, and continued to meet them through June 30, 1993, Finding 1, Record p. 25; that the medical evidence established that she had a back impairment that did not meet or equal an impairment listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p. 25; that she lacked the residual functional capacity to perform the physical requirements of sedentary work from February 11, 1993 to January 18, 1995, Finding 4, Record p. 25; that she was unable to perform her past relevant work, Finding 5, Record p. 25; that she was a younger individual (23 years of age on February 11, 1993) with a twelfth grade education, Findings 6 and 7, Record p. 25; that application of 20 C.F.R. § 404, Subpart P, Appendix 2, § 201.00(h) ("the Grid") supports a finding that she was disabled from February 11, 1993 to January 18, 1995, Finding 8, Record p. 25; that as of January 19, 1995 her medical condition had improved, she could sit for six hours and walk and stand for two hours in an eight hour work day, and she could lift and carry ten pounds, Finding 9, Record p. 25; that as of January 19, 1995, the application of 20 C.F.R. § 404, Subpart P, Appendix 2, Regulations No. 4 and 20 C.F.R. §§ 404.1569a and 416.969a supported a finding that she was not disabled, Finding 9, Record p. 26; and that her disability ceased on January 19, 1995, Finding 10, Record p. 26. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. § § 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(f), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must

be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff argues that there is not substantial evidence in the record to support the finding that her medical condition improved as of January 19, 1995. This determination was made at Step Five of the sequential evaluation process, where the burden of proof rests with the Commissioner. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7.

In order to evaluate this argument, it is first necessary to determine the applicable standard of review. This is a "closed period" case, in which the Commissioner finds in a single proceeding that a period of disability began and ended before the date upon which the Administrative Law Judge's decision was issued. The circuits have differed on the question whether such a determination constitutes a termination of benefits, in which case the standards for termination set forth in 42 U.S.C. § 423(f)[2] must be met, or whether in such a case the entire record should be

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[2] The statute provides, in relevant part:

> **Standard of review for termination of disability benefits**.
> A recipient of benefits under this subchapter or subchapter XVIII of this chapter based on the disability of any individual may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by --
>
> (1) substantial evidence which demonstrates that --
>
> (A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and
>
> (B) the individual is now able to engage in substantial gainful activity . . . .

reviewed to determine whether there was substantial evidence in the record to support the finding that the claimant was not disabled on the ending date of the closed period, without regard for the "medical improvement" standards found in the statute. The Eighth Circuit holds that closed period cases are not termination cases, and that the statutory standards for medical improvement do not apply. *Camp v. Heckler*, 780 F.2d 721, 722 (8th Cir. 1986). Two circuits have reviewed closed period cases without applying the statutory standards and without mentioning this issue. *Decker v. Chater*, 86 F.3d 953, 955 (10th Cir. 1996); *Chavez v. Bowen*, 844 F.2d 691, 694 (9th Cir. 1989). Three circuits have held that an appeal from a closed period case must be evaluated under the statutory medical improvement requirements, beginning with *Pickett v. Bowen*, 833 F.2d 288, 293 & n.4 (11th Cir. 1987), which specifically rejected the *Camp* rationale. *Jones v. Shalala*, 10 F.3d 522, 524 (7th Cir. 1993); *Chrupcala v. Heckler*, 829 F.2d 1269, 1274 (3d Cir. 1987).

At oral argument I requested counsel for the parties to submit memoranda addressing the conflict among the circuits. The brief submitted by the Commissioner does not do so, but casts its argument in terms of the statutory standards for termination cases. Defendant's Memorandum in Support of Motion for Order Affirming the Decision of the Commissioner (Docket No. 4) ("Defendant's Memorandum") at 4-5, 11-13. The plaintiff argues convincingly that the statutory medical improvement requirements apply. Plaintiff's Memorandum of Law (Docket No. 5) at 2-5. Therefore, those standards will guide the court's review in this case. *See also* 20 C.F.R. § § 404.1594(b) & (c), 416.994(b).

In order to support the Administrative Law Judge's finding that the plaintiff demonstrated medical improvement as of January 19, 1995, the record must contain evidence of a decrease in the severity of the plaintiff's back impairment "based on changes in the symptoms, signs and/or

laboratory findings associated with" that impairment. 20 C.F.R. §§ 404.1594(b)(1) & (c)(1); 416.994(b)(1) & (2). "To find medical improvement, the Commissioner must compare the prior and current medical evidence to determine whether there have been any such changes in the signs, symptoms and laboratory findings associated with the claimant's impairment." *Rice v. Chater*, 86 F.3d 1, 2 (1st Cir. 1996). Only if those indicia have improved may benefits be terminated on the basis of medical improvement. *Id*. at 2, n.2. Failure to seek treatment is not evidence of medical improvement. *Id*. at 2. The regulations require actual physical improvement in a claimant's impairment, not merely an improved prognosis. *Id*. at 3.

The Administrative Law Judge relied on the office notes of Thomas A. Martin, Jr., M.D., an orthopedist, who saw the plaintiff as a treating physician on January 4 and January 18, 1995, Record pp. 144-45, and the report of an MRI performed on January 11, 1995, *id*. at 146-48, to support his finding of medical improvement, *id*. at 24. However, there is no indication that the Administrative Law Judge compared the signs set forth in these notes with any signs set forth in prior medical notes or reports, or that he compared the laboratory findings of the MRI with any previous laboratory findings. The plaintiff's testimony was that her symptoms had changed, but only for the worse. *Id.* at 34, 37-38, 41-42. The signs reported by Dr. Martin on examination, *id.* at 145, do not appear to differ significantly in terms of improvement from those noted by Raul T. Aparicio, M.D., the plaintiff's previous treating orthopedic surgeon, in February 1994, *id*. at 121-22, during the period in which the Administrative Law Judge found the plaintiff to be disabled. While the Administrative Law Judge did discount the plaintiff's credibility, *id*. at 24, rejection of her testimony regarding symptoms is not sufficient to meet the statutory standards for medical improvement.

The Administrative Law Judge's conclusion that the plaintiff had improved to the point

where she could "sit for six hours, in two hour intervals, in an eight hour workday and . . . walk and stand for two hours in an eight hour workday," and "lift and carry up to ten pounds," *id*. at 24-25, is without evidentiary support in the record. The only evaluation of the plaintiff's exertional capacity in these terms was a consultative review of her medical records, completed on March 10, 1994, *id.* at 93-100, during the period when the Administrative Law Judge found her to be disabled, which shows capacities in excess of those found by the Administrative Law Judge at her "improved" stage in January 1995.

Given the lack of substantial evidence to support a finding of medical improvement in the plaintiff's impairment,[3] the Commissioner could not terminate her benefits without showing application of an exception under 20 C.F.R. §§ 404.1594(d) or (e), 416.994(b)(3) or (4). *Rice*, 86 F.3d at 3. This question was not considered by the Commissioner. Therefore, remand for further proceedings consistent with this opinion is appropriate. *Id.*

For the foregoing reasons, I recommend that the Commissioner's decision that improvement in the plaintiff's medical condition renders her no longer eligible for benefits as of January 19, 1995, be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.[4]

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[3] It is unnecessary to consider the additional evidence supplied to the Appeals Council by the plaintiff. Record pp. 149-60. However, because the Commissioner has taken the position that *Eads v. Secretary of Health & Human Servs*., 983 F.2d 815 (7th Cir. 1993), precludes any consideration of such evidence, Defendant's Memorandum at 11 n.6, a cautionary note is in order. *Eads* has been rejected by every circuit that has subsequently considered this question. *E.g.*, *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994); *Keeton v. Department of Health & Human Servs*., 21 F.3d 1064, 1067 (11th Cir. 1994); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993). This court will consider such evidence when it relates to the period before the date of the Administrative Law Judge's decision. *See* 20 C.F.R. §§ 404.970, 416.1470.

[4]Accordingly, I need not consider the plaintiff's further arguments that: (1) the (continued...)

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 19th day of December, 1996.

David M. Cohen
United States Magistrate Judge

[4](...continued)
Administrative Law Judge was required to seek the opinion of a medical expert concerning her residual functional capacity as of January 19, 1995; and (2) the Administrative Law Judge failed to consider the effect of her pain on her residual functional capacity as of January 19, 1995.